

R E P O R T

to

John P. Milligan

Assistant Commissioner of Education

and

Director, Division Against Discrimination

Department of Education, State of New Jersey

Submitted by:

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Introduction

This report has been prepared by Milton R. Konvitz, Theodore Leskes, Mildred H. Mahoney, and Milo Manley, who were designated a panel of experts by Dr. John P. Milligan, Director of the New Jersey State Division Against Discrimination, to study the compliance operations of the agency and to make suggestions and recommendations for improvement.

This report is based upon an examination of cases from the files of the agency; a study of its annual reports and other published and unpublished materials of the agency; discussions with Dr. Milligan and Mr. Harold A. Lett, Assistant Director, and with members of the agency's staff; discussions with citizens of the State of New Jersey who are not connected with the agency but who have had relations with it and know the agency's work and reputation; discussions with members of staffs of comparable agencies; and a general knowledge of the operations of state laws against discrimination and state civil rights laws.

We have not been commissioned to make a comprehensive study of the agency or a general evaluation of its work. We were asked to direct our investigation toward the objective of providing the Director with constructive recommendations for improvement of the agency's compliance machinery. We have directed our efforts towards this accomplishment. Since, however, compliance shares with education the central place in the policy and work of the agency, we could not help but arrive at certain thoughts that transcend problems of compliance as narrowly construed. Accordingly, our report is in two parts; namely, recommendations that are concerned directly with compliance, and recommendations that may affect compliance but go beyond it as well.

We wish to record the fact that in our study we enjoyed the full and candid cooperation of all officials of the agency and of its staff members, both professional and secretarial. We were most favorably impressed with the courtesy, devotion to duty, and eagerness to receive constructive guidance manifested by all persons connected with the agency whom we consulted.

We wish also to record our impression that the agency, second oldest of its kind in the United States, enjoys, justly, a high reputation throughout the United States where anti-discrimination policies are favored. While two members of this panel are prominently identified with similar state agencies, all of us proceeded with our assignment and work with the thought that the New Jersey agency wishes to achieve the position of preeminence among civil rights agencies and that it is our obligation to make recommendations that aim for perfection--practical, however, rather than utopian perfection. Our recommendations do not, therefore, carry any implication that the New Jersey agency is in any respect inferior to any comparable agency in the United States.

We suggest that perhaps a year from now we be reconvened to follow up our report, in order to see how much of our effort has borne fruit and how much was misguided by reason of our possession of insufficient facts or by reason of lack of understanding of the problems.

A draft of our report was shown to Dr. Milligan and Mr. Lett, so that they might call our attention to misstatements of fact or to an absence of clarity in some of our points. In the light of their comments, a few changes have been made, but none that affect value judgments or policy recommendations. This report represents the independent views and judgments of the persons who submit it.

Part One: Enforcement

- I. The Director and Assistant Director should play a more active role in the handling of cases, even in some cases that do not involve a public hearing. This is necessary for a number of objectives that we consider desirable:
 - A. To set a pattern of high quality for the members of the staff.
 - B. To impress on respondents, especially important employers or owners of important places of public accommodations, that the highest levels of intelligence and responsibility have come to grip with the complaint that has been made.
 - C. To strengthen the tone of the agency both internally and externally, by giving a stronger emphasis on enforcement than seems to many persons to obtain at the present time.

To achieve these ends, it probably will mean that the Director and Assistant Director will need to sacrifice some opportunities for meeting with groups and for public addresses, but we feel that a redistribution of their time, toward more concentration on internal administration and more active supervision of the handling of cases, would result in an enhancement of the reputation of the agency and a strengthening of its position vis-a-vis the public and particularly agencies and organizations closely identified with civil rights interests.

Some comparable state agencies are made up of multiple commissioners, each of whom handles enforcement cases, and they thus achieve, to a degree, the desirable results for which we are aiming. In the New Jersey agency, the best way of achieving these results, it seems to us, is to adopt these recommendations concerning the roles of the Director and the Assistant Director.

We do not, however, mean to imply that the Director and Assistant Director are open to criticism because in the past they may have concentrated more on the educational and public relations aspects of their offices than on the details of enforcement procedures and policies. We are aware of the fact that an agency such as D&D, engaged in a pioneering effort in a field that until recently was barely touched by public policy as expressed in legislation and court decision, has had the obligation to win acceptance of itself and its program by the citizens of the State; and that towards achievement of this objective the educational and public relations work of the Director and Assistant Director has been indispensable; and that they deserve recognition for the outstanding contribution they have made to public understanding and acceptance of the policy upon which the agency is founded and upon which it conducts its work of law enforcement. We would say, however, that perhaps the time has come, more than a decade after establishment of the agency, to reconsider

the question of distribution of effort, time, and emphasis as between the educational and public relations work, on the one hand, and enforcement work, on the other hand. It will always be difficult to establish and maintain a perfect balance between these objectives; and we are not sure that such a balance is always desirable, for D&D operates within a climate of opinion to which it must be extremely sensitive, but it is a climate of opinion which it also helps to create and mould. Extreme sensitivity as to where to throw the weight of the agency, how much of it to throw in a particular direction, and for how long, will always be required. We only mean to point up the problem and to direct fresh attention to it. Its resolution in a very complex situation must be left to the informed judgment of the Director.

D. We have spoken of the Director and the Assistant Director. Good administrative policy would require that one or the other official have final responsibility for the culmination of enforcement cases. We do not, however, feel that it is within our competence to recommend vesting of authority in one official or the other. The decision will need to be made by the Director; but it should be made, and his decision should be expressed formally.

E. Note should be taken, however, that proper administrative procedure may require a separation of function as between conciliation or mediation on the one hand, and formal compliance hearings on the other, so that the official who performs the former function may need to disqualify himself from sitting as a hearing officer if such case should proceed to the public hearing stage. The Director, in delegating powers or in deciding to participate in an important case himself, should bear this in mind. It should be noted that only very seldom does a case develop to the point where a formal hearing is had. It would therefore appear that the Director might more often than not assume that the case will not proceed to the public hearing stage, and accordingly participate actively in the conciliation or mediation process.

II. It will be beneficial to the agency to have its own counsel, who should be a full-time member of the staff, but not necessarily one who will devote his full-time to legal matters. If he is a properly qualified person, perhaps he ought to act in the capacity of counsel and also be concerned with the direction of compliance procedures. A person with legal background and training who, at the same time, possesses administrative ability and interest, ought to be extremely useful to the agency in many respects. In describing the functions of such a staff member, we shall be also pointing up some improvements that, in our judgment, are indicated; as follows:

- F. Rep with Legal Training*
- A. The drafting of the document which finally closes a case requires a trained intelligence that can distinguish between essential facts and unessential facts or mere details, that can organize the facts so as to point to a significant legal conclusion, and that can point up the accomplishment that is the result of the time and effort that have been put into a case. We feel that, at the present time, the final reports do not reflect, in many instances, the intellectual and professional qualities that ought to go into such public documents. Counsel could be helpful in assisting other members of the staff by editing their reports or by actually writing them in some instances. In any case, counsel ought to review every final disposition and report before it is accepted and signed by Dr. Milligan or Mr. Lett.
 - B. The agency needs to have clearly defined definitions of important steps in the procedures and of substantive concepts that are extremely important in the agency's operation; for example, the term "probable cause", we feel, is not sufficiently understood and not used with uniformity of meaning by the staff. Counsel should have the duty to prepare and to review constantly and revise definitions, standards and procedures that are necessary in the operation of the agency. He ought to revise the forms and continually make efforts to improve them. He ought to have charge of the preparation and editing of the manual.
 - C. Counsel ought to prepare from time to time a digest of case decisions, which should be kept up to date cumulatively, so that there would be built up a continuity of recorded experience which would make possible the transmission of that experience to members of the staff and especially to new staff members.
 - D. Counsel would meet with attorney for the respondent in cases where the respondent retains an attorney.

Of course, in all of his activities, counsel would be acting under the guidance and with the advice of the Director or Assistant Director, depending on the function he performs. But the time has come to delegate to a properly qualified, and especially a legally trained person, some duties and functions.

- III. We are aware of the need for a tightening of procedures, particularly to eliminate a time lag which struck us as existing in some of the cases that we have examined.

This is, of course, a complaint which is made against almost all judicial and administrative agencies. In New Jersey, this matter was dramatically publicized by the late Arthur T. Vanderbilt in connection with the courts. Complaints with respect to such time lag in administrative agencies are frequently made before congressional committees. We mention this in order to make clear the fact that it is a perennial problem in the operation of almost any public agency. It is not, however, an inevitable fault which must continue to exist in the agencies or in the courts.

A number of devices occur to us for the reduction, if not the complete elimination, of the problem.

- A. A senior field representative should be directed to procure fortnightly reports on pending cases, and a list of such cases should be submitted by him to the Director and Assistant Director, and a copy should be posted in the Newark and Trenton offices.
- B. Where it is apparent from the report to the senior field representative that a case is not being handled as expeditiously as it should be, he should take the matter up with the field representative in question, and if that field representative has too heavy a case load and another field representative has too light a case load, a redistribution of cases might be effected if the field representative has not done much work on the case. It would be desirable, in most instances, however, not to transfer cases but to find ways of expediting the handling of the cases by the field representatives.
- C. A semi-annual docket of cases should be prepared and copies should be sent out to interested agencies, so that they may be aware of the case load of the agency and also of the nature of the cases that are being handled.

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This docket of cases should not, of course, disclose names of respondents where such a disclosure would violate law or policy.

We make this recommendation because sympathetic understanding of the work of DAD among civil rights, civil liberties, social service, and related agencies has not always been won in full measure. The annual reports are insufficient to make these agencies aware of the day-to-day work of DAD. We think that a semi-annual report, not limited to statistical tables but one that will convey a sense of the factuality of the complaints and of their efficient processing, would be helpful.

If after the experience of several years it is found that the semi-annual case dockets do not achieve their purpose, they may then be discontinued. As in the case of all other recommendations made in this report, this recommendation should be understood to be offered for experimentation and to have only tentative, hypothetical value.

- D. There ought to be a more detailed classification of cases in so far as reporting is concerned. Cases in which there are public hearings should be classified as such. Cases that go to the courts should be classified as such.
- E. Expedition, as important as it is, should not be achieved by the sacrifice of justice and propriety or any other important value. We recognize that there will be occasions when it will be best to keep a case open in order to achieve ultimately an important objective. In such instances, the docket, both fortnight and semi-annual, should make note of the fact that certain cases advisedly are taking what might appear to an outsider an undue amount of time, because of special circumstances, though the circumstances need not be disclosed.

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IV. In connection with compliance procedures and enforcement, we make the following suggestions:

- A. In every instance when there is a consent agreement or a cease and desist order, there should be a requirement for posting of the official poster that the agency uses.
 - B. When a case is terminated for whatever cause, the responsible officer of the agency, we assume either the Director or Assistant Director, should write a letter to the complainant tailored to the special circumstances of the case in question. It should not be a short form letter. The complainant ought to be made to feel that his case received serious consideration; that the person writing the letter knew the special circumstances of the case; that the agency is grateful to the complainant for having taken the time and the trouble to bring the case to the attention of the proper authorities in the public interest; and that the agency is there to look after the interests of persons who, rightly or even mistakenly, consider themselves aggrieved under the act. Where the complainant is within easy access to the office, it might be desirable to ask the complainant that he come in for a conference.
 - C. When a case is closed, it often will be desirable to write a similar letter to the respondent to explain to him what has transpired, so that even if a case is dismissed, a lesson will be learned by a citizen or a group of citizens from the process to which he has been exposed by a legal agency of the state.
 - D. While a case is pending, if it seems to drag out for justifiable reasons, it would be well to keep the complainant and the respondent advised from time to time by letter that the case is open and active.
 - E. We would recommend that the mimeographed "memorandum of agreement" be discarded, and that each memorandum of agreement be prepared especially for each particular case. This would be much more impressive on both the respondent and the complainant and everyone else concerned.
- V. Cases that have been closed after a finding of a dereliction of the law ought to be followed up to make sure that compliance with the law has been accomplished. We recognize the fact that the agency ought not to act in such a way as to make it appear that it is harassing citizens, or that it is stimulating litigation or complaints; however, the agency is charged with the enforcement of the law and not merely with the obligation to make a final order, and often enforcement will be dependent upon the degree of vigilance shown by the agency in winning respect for the cease and desist orders that it has issued or for the voluntary agreements negotiated with respondents. To achieve this result, we recommend a special follow-up docket of closed cases. The follow-up should normally be accomplished within a period of six months.

If, with the present staff, it is felt that there is insufficient manpower for this follow-up procedure, then the agency ought to get additional personnel to meet the need. We make this suggestion, not because we feel that the staff is, at the present time, insufficient--we have no judgment on that at all--but only because we want to emphasize the importance of the follow-up operation.

VI. Some statutory amendments seem to be indicated, as follows:

- A. The New Jersey Division Against Discrimination is one of the few civil rights agencies which does not have the statutory power to initiate complaints. Such power is vested in aggrieved persons, in the Attorney General, and in the Commissioner of Labor. In eight other states the law does vest in the agency itself this power. While occasions to exercise this power may be few and far between, we feel that the power ought to exist in the agency, so that, should the occasion for its use arise, the agency could proceed.

*Law Committee
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The Legislature has recognized the fact that not only aggrieved parties should have the power to initiate complaints; it has given recognition to this fact by providing for the power in the Attorney General and the Commissioner of Labor. Having recognized the fact that an un-aggrieved party should have the power to file complaints, the Legislature should be asked to go one step further, for it is not the Attorney General or the Commissioner of Labor who is likely to have the most sympathy for, and the best understanding of, the public policy which is the basis of the Anti-Discrimination Law; such sympathy and understanding rest peculiarly in the DAD and, therefore, the DAD ought to have the power to initiate complaints.

- B. We think that the name of the agency lacks the kind of appeal that the name ought to have. It would be well to consider the desirability of changing the name by a statutory amendment. In view of the fact that the Civil Rights Commission is part of the anti-discrimination machinery in the existing New Jersey legislation, and in view of the fact that the work of the agency transcends fair employment practice, perhaps a name with "civil rights" in it would be the best choice.
- C. The statute now provides for organization of the agency into two sections. This, as we know, has not been followed in practice. This provision ought to be eliminated from the law, and the best method of organizing the agency should be left to the director.

VII. We have come across cases in our examination where, after going into the merits of a complaint, it is found that the complaint, on its specific facts, will not stand up, and then the case is closed out upon that finding. It seems to us that in some cases, particularly where employment is involved, the agency should take advantage of the opening of the door and attempt to find out about the general employment practices of the company and to improve the employment situation of the company generally from the standpoint of the Anti-Discrimination Law. Often this might be more important than effecting a satisfactory settlement of a complainant's specific case. In such instances, where the agency is left without a specific

complainant, the case could be more effectively handled if Dr. Milligan or Mr. Lett were personally to step into the case.

These are also situations where, since a complainant has been eliminated, the agency ought to possess the power to initiate complaints, not that it would necessarily use that power in all such cases, but the possession of the power would give it legal status, strength, and dignity.

VIII. For more complete control and reporting of conferences between field representatives and their supervisors, consideration might be given to modifying the final disposition report form, so that it would expressly show the number of conferences which the field representative had with his supervisors and with Mr. Lett and Dr. Milligan. A minute should be made of the subject matter and conclusions of these discussions, and these should be appended to, and form a part of, the case record.

IX. The agency in the past frequently has called upon employers to correct employment and advertising forms which have violated the law. This activity of the agency is not reflected in the reports. We suggest that this activity be reflected in the reports. We suggest that some follow-up procedure be developed with respect to the companies that are called upon to correct their forms.

In this connection, it would be well for field representatives, when they go to a place of employment or a place of public accommodation, as a matter of routine to ask for and take back with them employment forms, advertising specimens and other data which may have some bearing upon practices of the establishment being investigated.

X. It has come to our attention from several sources that there is a general impression that the agency has had an inclination to permit the owner of swimming pools, operated for public accommodation, when a complaint is made, to convert the public accommodation into an allegedly private club. The impression prevails that the agency has not been sufficiently vigilant and militant in the handling of swimming pool cases.

We by no means affirm the validity of this criticism. We feel, however, that it is our duty to call the agency's attention to the fact that this criticism is frequently being made. The criticism tends to color the general reputation of the agency as an enforcement organ. Perhaps with respect to such public accommodation cases particularly, our suggestions regarding follow-up procedures would seem to be especially indicated.

Part Two: General

- I. It would be helpful to the agency generally if it set up industry-wide and other types of advisory groups throughout the state, to serve as sources of information and strength for the agency. Such advisory groups might also be resorted to by aggrieved persons in their localities for advice and direction.

At this time an advisory group concerned specifically with housing might be particularly helpful.

- II. A research director ought to be engaged, who would have broad duties to conduct research or studies. Studies that have been made in the past by the agency quickly lose their value if they are not kept up to date by periodical revisions. Industry-wide studies, conducted with the help of industry-wide advisory councils, ought to be undertaken. Studies of minority group employment in the state, particularly of the impact of a recession upon members of minority groups, should be undertaken. The activities and practices of commercial employment agencies might be another fruitful area for study.

- III. An annual conference should be convened by the agency, for private civil rights organizations, educational groups, employment and personnel directors, labor union officials, public enforcement officers, and other interested organizations and persons in the state. At such annual conferences, the agency could take advantage of the opportunity to win sympathetic understanding not only of its accomplishments but more particularly of the problems that stand in the way of greater degrees of success.

Particularly for the year 1960 should such a conference be planned, because it will be the 15th Anniversary of the establishment of the New Jersey agency, which next to the New York agency, is the oldest in the country, and a 15th Anniversary conference ought to be an occasion for a notable program that will focus attention on the New Jersey agency in such a way as to make the work of the agency a matter of pride nationally and internationally. We use the latter word advisedly because of the great international interest in how Americans handle their problems of minorities. For this conference, nationally known persons ought to be invited as participants, and national and state agencies in the field of minority group relations ought to be involved. We believe this fall will not be too early a time to begin to think concretely of such a conference.

Perhaps the 1960 conference might be the first of the series of annual conferences that the agency will initiate.

Annual conferences will have, we trust, the effect of rallying the public support for the agency which it sometimes lacks.

- IV. Periodic, and frequent, staff conferences ought to be conducted, first for the dissemination of information, so that a common pool of knowledge will be built up for all the members of the staff; and secondly, for the teaching of new techniques, for the discovery of creative thoughts, for the improvement of procedures, and for other self-educational and morale-building purposes.
- V. The annual report of the agency should be prepared in such a way that the average citizen will be able to learn from its contents and from the way the matters are presented what the state is doing on behalf of minority groups. Perhaps some more carefully selected and properly styled case histories would be helpful. Fuller statistical material should be presented. There might be times when an especially written essay or message might be included. The annual report might point up not only accomplishments but also future needs and future plans. The 15th annual report should be an especially attractive one.
- VI. The physical appearance and structure of the office in Newark could be greatly improved. There seems to be no provision for a private conference. The main room seems to be an open, sprawling and all-enveloping room, so that the impression is that that is all there is. The office is located in a fine building, but the office itself ought to be reorganized in such a way as to make it more impressive and allow for more efficient use of its space and of the time of the staff.
- VII. We are strongly of the opinion that the staff, starting with the Assistant Director and going down, are underpaid. The salary structure should be restudied so as to make the current jobs more attractive and so that there be inducements to staff to train for improvement within their own jobs. Although New Jersey has a Negro population of approximately 6 percent, the second highest percentage among the 15 states that have anti-discrimination agencies--the per capita cost of the operation of the agency would hardly reflect this fact. A comparative study indicates that per capita expenditure for the operation of the agency in New Jersey is .0211. This compares unfavorably with New York, which has a per capita expenditure of almost twice that amount, or .0393; or Rhode Island, which has a per capita expenditure of .0453; or Connecticut .0403. The average for all the states with agencies is .0221. New Jersey falls even below the average, although it has a case load annually that is approximately 10 percent of the total of approximately 2,000 cases that are handled collectively by all the anti-discrimination agencies in the country.

The State should provide higher salaries for the Assistant Director and the members of the staff and grant a budget more commensurate with the needs of the agency, the dignity it should enjoy, the wealth of the State, and the importance of civil rights education and protection.

- VIII. We recommend that the title of Mr. Lett be changed from Assistant to Deputy Director. This change would more accurately reflect Mr. Lett's functions. By raising the dignity of his office, the dignity of the agency would at the same time be enhanced.

Respectfully submitted,

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